Supreme Court, U.S.
FILED

991132 JAN - 4 2000

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
Counsel of Record
COLLEEN M. GRIFFIN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-4684

Counsel for Petitioner

Printed by Authority of the State of Illinois (P.O. 27164—55—1-4-00)

36 pp

QUESTION PRESENTED FOR REVIEW

Whether it is constitutionally reasonable for police officers to secure a residence from the outside, and prohibit the occupant's entry into that residence for a short time while they obtain a search warrant based on probable cause, when this Court has suggested that that is reasonable under the Fourth Amendment in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984) and other courts have found similar behavior consistent with the Fourth Amendment, and *Segura*.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INCORRECTLY FOUND THAT *SEGURA* DID NOT ALLOW THE IMPOUNDMENT OF RESPONDENT'S RESIDENCE AND THE DENIAL OF ACCESS TO HIM WHILE AWAITING A SEARCH WARRANT BASED ON PROBABLE CAUSE	5
CONCLUSION	15
APPENDIX	*infra*

TABLE OF AUTHORITIES

United States Supreme Court Cases:	PAGE(S)
Florida v. Jimeno, 500 U.S. 248, 114 L.Ed.2d 297, 111 S.Ct. 1801 (1991)	10
Segura v. United States, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984)	i, 3, 5, 6, 7, 8
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989)	9
Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)	10
United States v. Jacobsen, 466 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984)	9, 10
United States v. Place, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983)	9, 10
Other Cases:	
Ferdin v. Superior Court, 36 Cal. App. 3d 774, 112 Cal. Rptr. 66 (1974)	13
People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999)	1, 3, 4, 9

United States v. Crespo de Llano,
838 F.2d 1006 (9th Cir. 1987) 13, 14

United States v. Roby,
122 F.3d 1120 (8th Cir. 1997) 13

United States v. Veillette,
778 F.2d 899 (1st Cir. 1985) 12

Additional Authority:

LaFave, SEARCH AND SEIZURE,
3rd ed., Vol. III, sec. 6.5(c)
(1996) 6, 9

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully asks this Court to issue a writ of certiorari to the Appellate Court of Illinois, Fourth District, to review that court's judgment and opinion entered on May 7, 1999.

OPINION BELOW

The Appellate Court of Illinois, Fourth District, issued its opinion in this case on May 7, 1999. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999). This decision is reprinted in the appendix to this petition. The October 6, 1999, order of the Illinois Supreme Court, denying Illinois' Petition for Leave to Appeal, is also reprinted in the appendix to this petition. *People v. McArthur*, 1999 Ill. LEXIS 1246 (Ill. Oct. 6, 1999).

JURISDICTION

The Appellate Court of Illinois, Fourth District, entered its judgment on May 7, 1999, and the Illinois Supreme Court denied Illinois' Petition for Leave to Appeal on October 6, 1999. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), since, in the proceedings in the state courts of Illinois, the Respondent asserted an alleged violation of his rights arising under the United States Constitution.

STATEMENT OF THE CASE

On April 2, 1997, Sullivan, Illinois police officers accompanied Tera McArthur to her trailer to remove belongings from her home which she shared with her husband, the Respondent, Charles McArthur. (R. 4). After Tera removed her belongings, she informed Officer John Love, who was standing on the porch, that Respondent had "pot" in the trailer under the couch. Love knocked on the door and, when Respondent answered, Love told him Tera had said that he had drugs in the trailer. Respondent denied he had drugs in the trailer and denied Love's request to search the trailer for drugs without a warrant. At that point, Respondent had stepped outside, and was standing on the porch of the trailer. Tera agreed to go with another officer to testify before a judge to secure a warrant. (R. 5-6). From that point, Officer Love did not allow Respondent to re-enter the trailer unless accompanied by an officer. (R. 7). Respondent testified that he asked if he could wait inside the trailer by himself while the warrant was being sought, and that Love told him that he could not enter unless there was an officer present. (R. 17-18). Love did allow Respondent to re-enter to get cigarettes and make telephone calls. However, on these occasions, Love stepped "right inside the door," but, according to Respondent, did not conduct a search. (R. 8, 22). While waiting for the warrant, no officer told Respondent that he was under arrest, placed him in handcuffs, or told him that he was not free to leave. (R. 12).

When the police returned with the warrant about one to two hours later, Respondent entered the trailer and showed them where the drugs were located. Respondent was arrested, searched and handcuffed. (R. 13, 20). Respondent agreed that, if he had been allowed to enter the residence while waiting for the warrant, he would have destroyed the contraband. (R. 18). After Respondent was charged with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of a substance containing less than 2.5 grams of cannabis (720 ILCS 600/3.5(a); 550/4(a) (West 1996)), he filed a motion to suppress the evidence found at the residence during the execution of a valid search warrant. (C. 39-41). Respondent argued that his Fourth Amendment rights were violated because the police secured his residence and prevented him from re-entering his residence alone during the two hours it took to obtain the search warrant. The trial court granted Respondent's motion to suppress. (R. 35, C. 80-81). Petitioner appealed, and the Fourth District appellate court affirmed. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999).

The Fourth District appellate court found that this case represented a situation which was not addressed in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984); that is, if a person can be denied access to his home where it is secured from the outside based on probable cause while a search warrant is being obtained. The court acknowledged that both the *Segura* majority and the dissent implied that securing a residence from the outside when probable cause exists may not violate the Fourth Amendment's prohibition against unreasonable seizures, but found that *Segura* did not address whether police, when securing a residence, may limit the "freedom of movement of persons within, into or out of" the secured premises. *McArthur*, 713 N.E.2d at 96. The court found that, even

though there was probable cause, since Respondent came onto the porch and never left the premises, this case involved a "constructive eviction." In so holding, the court distinguished this case from the situation where the "defendant resident is not on the premises when police arrive to secure the residence from the outside while seeking a search warrant; that is, where police, with probable cause, secure a residence and do not permit anyone arriving at the premises (from the outside) entrance into the residence." *McArthur*, 713 N.E.2d at 98.[1] The court further found that the police carried out an unlawful search when an officer stood in the doorway of the trailer, with Respondent's foreknowledge, after he entered to make telephone calls and get cigarettes.

The court concluded that there was no authority for the police action in this case, finding that the police conduct in securing Respondent's residence while awaiting the search warrant was an unreasonable seizure (and probably an unreasonable search) under the Fourth Amendment so that the evidence discovered in the residence upon execution of the search warrant was properly suppressed. *McArthur*, 713 N.E.2d at 98-99.

---

[1] Although the court appeared to make this distinction here, earlier in its decision the court stated that this was not one of the three situations where it would be permissible for police to secure a residence from the outside while seeking a warrant, and bar access to that residence, finding that *Segura* only allows this when the only persons who could claim access: 1) are already in custody; 2) are subject to arrest when they appear; or 3) have consented to remain outside. *McArthur*, 713 N.E.2d at 98.

Petitioner filed a timely Petition for Leave to Appeal to the Illinois Supreme Court. On October 6, 1999, the Illinois Supreme Court denied the Petition for Leave to Appeal. On November 5, 1999, the Illinois Supreme Court granted the State's motion to stay issuance of the mandate.

Petitioner, the People of the State of Illinois, now seeks a writ of certiorari from this Court to review the judgment and opinion of the Appellate Court of Illinois, Fourth District.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INCORRECTLY FOUND THAT *SEGURA* DID NOT ALLOW THE IMPOUNDMENT OF RESPONDENT'S RESIDENCE OR THE DENIAL OF ACCESS TO HIM WHILE AWAITING A SEARCH WARRANT BASED ON PROBABLE CAUSE.

The Illinois Appellate Court's opinion in this case misconstrues and unjustifiably limits this Court's holding in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599 104 S.Ct. 3380 (1984), and conflicts with the federal and state courts which have determined if one's possessory interests can be interfered with while police are awaiting a search warrant based on probable cause under *Segura*. Both the majority and the dissent in *Segura* agreed that securing a residence from the outside when probable cause exists may not violate the Fourth Amendment's prohibition against unreasonable seizures. While *Segura* does not specifically address the question of the extent to which one's possessory interests can be interfered with to achieve that result, the

appellate court's finding of a Fourth Amendment violation is wrong, and this Court must address this important question. In *Segura*, this Court observed that "different interests are implicated by a seizure than by a search." A seizure affects only the person's possessory interests; a search affects a person's privacy interests. *Segura*, 468 U.S. at 806. A seizure of a dwelling prior to the execution of a warrant is allowable where there is probable cause unconnected with the seizure. *Segura*, 468 U.S. at 811-812. Recognizing the "generally less intrusive nature of a seizure [citation omitted], the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible." *Segura*, 468 U.S. at 806.

While the *Segura* Court was severely divided—four justices dissented—and the opinion, written by Chief Justice Burger, was joined only by Justice O'Connor in the part (part IV) that expressly found that securing the defendant's apartment from the inside was a lawful seizure (*Segura*, 468 U.S. at 798), one rule of law is clear from the decision in *Segura*. Professor LaFave in his careful analysis of *Segura, in toto*, concluded, *inter alia*: "All members of the Court appear to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause even absent exigent circumstances." *LaFave*, SEARCH AND SEIZURE, 3rd ed., Vol. III, sec 6.5(c), 366 (1996).

In part IV of *Segura*, the Chief Justice, joined by Justice O"Connor, wrote: "We hold, therefore, that securing a dwelling, on the basis of probable cause, to

prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or it contents." *Segura*, 468 U.S. at 810. In the dissent's view, the officers' seizure of the residence from the inside without a warrant and in the absence of exigent circumstances "was constitutionally unreasonable from the moment it began." *Segura*, 468 U.S. at 824. (Stevens, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ). However, in the accompanying footnote, Justice Stevens wrote:

> Since these premises were impounded 'from the inside,' I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter.

Segura, 468 U.S. at 824, n. 15.

Thus, six of the justices expressly considered external impoundment to be constitutionally permissible when based on probable cause and when a search warrant is being sought.

The remaining three justices (White, Powell, and Rehnquist, JJ) who, along with Justice O'Connor, joined the Chief Justice in part V of the opinion, agreed, at least implicitly. *Segura*, 468 U.S. at 810, 814. After noting that the evidence at issue was admissible under the independent source doctrine and explaining that the untainted search warrant "was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry," (*Segura*, 468 U.S. at 814), the five-justice majority wrote:

> Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here.

Segura, 468 U.S. at 814.

Clearly, the five majority justices considered that such a means of discovering evidence would raise no doubt about its passing constitutional muster. Thus, all members of the *Segura* Court agreed that a purely external seizure of a residence and its contents based on probable cause is permitted by the Fourth Amendment. The right of exclusion necessarily flows from the right to seize a residence and its contents from the outside based on probable cause. That this concomitant right exists is clear from the statement that the evidence would have been discovered as if the police had established "a perimeter stakeout to prevent *anyone* from entering and destroying evidence." *Segura*, 468 U.S. at 814 (emphasis added). An external impoundment would, by definition, include some type of possessory interference. This Court must more clearly define the extent that interference is reasonable, as courts, as shown here, are wrongly interpreting *Segura*.

Here, the Illinois Appellate Court found that this Court's opinion in *Segura* allowed only a warrantless seizure and securing of a residence based on probable cause while obtaining a warrant, and barring access to that residence, if one of three situations was present. Citing *LaFave*, the Illinois Appellate Court stated that *Segura* allows only denial of access when the only persons who could claim access: 1) are already in custody; 2) are subject to arrest when they appear; or 3) have consented to remain outside. *McArthur*, 713 N.E.2d at 98. However, the section of *LaFave* cited for this proposition merely was an overview of the cases that actually have addressed the issue, and was limited to their specific facts. *LaFave* goes on to say that "[the cases] thus do not unquestionably resolve the issue whether, for example in [citation] the police could have lawfully barred the defendant's mother and brother from entering their own home." *LaFave*, SEARCH AND SEIZURE, 3rd ed., Vol. III, sec. 6.5(c), 363 (1996). The fact that the question is not resolved is the reason that it must be decided by this Honorable Court.

As stated above, the Illinois Appellate Court erred in finding that the limited interference with Respondent's possessory interests here was unreasonable. A seizure of property occurs when governmental authorities exert dominion and control over property for their own purposes. *United States v. Jacobsen*, 466 U.S. 109, 120-121, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984). However, "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. (Citation) What is reasonable, of course 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 619, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989). There is no prohibition on a seizure of property to prevent loss or destruction of suspected contraband, as long as a warrant is obtained before the contents are examined. See *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983). If it is apparent that the property [or container] contains contraband, the seizure may be consti-

tutionally reasonable. Some seizures can be justified by an articulable suspicion of criminal activity. See *Place*, 462 U.S. at 702. Essentially, *Place* and *Jacobsen* hold that: (1) A seizure lawful at its inception can nonetheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests by, for example, converting a temporary deprivation into a permanent one; and (2) When possessory interests are affected, the reasonableness of the conduct must be balanced between the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. Also, the circumstances surrounding the seizure must be examined, including when the seizure is made and how it is carried out. That balancing requires inquiry into "whether the totality of the circumstances justified a particular sort of search or seizure." This case-specific balancing is consistent with a long line of this Court's decisions. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Even where an exception to the warrant requirement applies, searches and seizures can only be made upon probable cause and must be reasonable. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250, 114 L.Ed.2d 297, 111 S.Ct. 1801 (1991).

In this case, there unquestionably was probable cause, and the seizure, at its inception, was reasonable. The next question, whether the police conduct was reasonable under the Fourth Amendment, must be answered in the affirmative. The nature of the seizure was very limited. Respondent was merely not allowed access to his house for the short time that it would take

to obtain the warrant. Furthermore, the governmental interest was great. Respondent agreed that, if allowed to re-enter his house, he would destroy the contraband. In determining reasonableness, we can ask, "What else could the police do here?" The police did nothing more than was required and necessary to affect a seizure based on probable cause. Here, the officers, having probable cause that evidence was in Respondent's residence and believing that he would destroy it if he could, did what was reasonable. Instead of bursting in only to learn later that no exigent circumstances justified their entry, these officers seized the residence from the outside, prevented Respondent from entering and immediately sought a search warrant.[2] This was reasonable.

This Court must clarify what is a reasonable seizure while police await a warrant based on probable cause, and to what extent police may limit the freedom of movement of persons within, into or out of impounded premises. This Court must decide the issue of just how great an intrusion is involved in the impoundment procedure, and what limitations can be placed on the residents in balancing the interests involved. This question is sure to arise again, and this case presents the perfect opportunity in which to answer the question. Given the inevitable increased use of the procedure of securing a residence while waiting for a war-

---

[2] While the Illinois Appellate Court also found that the officer's conduct in standing in the doorway when he allowed Respondent to make a telephone call unreasonable, it is Petitioner's position that, if the securing of Respondent's residence was valid, allowing him to enter was merely a gratuitous act, and his accepting the limitations placed thereon was tantamount to a consensual situation. In addition, no evidence was seized as a result.

rant, and the possible increased use of telephone warrants,[3] this is a valid procedure whose limitations and perimeters must be established. Indeed, this type of action is being approved as an alternative to searches based on exigent circumstances. See *United States v. Veillette*, 778 F.2d 899 (1st Cir. 1985), where the court found that "even when an exigency is found, the least restrictive intrusion must be employed, or the whole constitutional requirement of obtaining a warrant would be defeated. When it is known that no one is presently on the premises, the property may be secured by merely guarding the entrances." *Veillette*, 778 F.2d at 902, n. 2. *Segura* leaves several unanswered questions;[4] most importantly, the extent to which a possessory interest in the secured premises can be interfered with must be decided.

Aside from the important constitutional question involved, and the fact that these impoundment procedures are bound to be utilized more frequently, this

---

[3] Rule 41(c)(2), Federal Rules of Criminal Procedure authorizes a warrant being issued over the telephone if certain conditions are met, as do several state statutes. This would limit the time a residence must be secured until a warrant could issue, making the practice much more attractive. See also *United States v. Alexander*, et al., 923 F.Supp. 617, 624 (U.S.D.C.Vt. 1996) (Procedures are in place within this district to insure the availability of judicial officers for telephone warrants, and the Court recommends that such procedures be utilized in the future.)

[4] One of those unanswered questions, whether a search pursuant to a warrant was tainted by what the police had seen during an initial unlawful entry, was resolved in *Murray v. United States*, 487 U.S. 533, 533, 101 L.Ed.2d 472, 108 S.Ct. 2529 (1988). See also *People v. Griffin*, 727 P.2d 55, 59 (Colo. 1986) ("*Segura*, leaves some unanswered questions. . .")

Court should take this case because the cases that have determined the issue have not undertaken a comprehensive Fourth Amendment analysis in determining the extent that possessory interests can be interfered with, and have basically, and rightly, assumed that *Segura* allows some possessory interference. See *United States v. Crespo de Llano*, 838 F.2d 1006 (9th Cir. 1987). In *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997), the court relied on this Court's opinion in *Segura* to find that the entry of a hotel room based on probable cause in order to wait for the warrant to issue was in accord with the Fourth Amendment. The officers announced themselves and allowed the suspect to use the room's lavatory facilities. The court found that "Roby's own movement was unencumbered," "the officers entered, but took no investigative steps; they merely preserved the space and checked to assure their own safety." *Roby*, 122 F.3d at 1125. In *Ferdin v. Superior Court*, 36 Cal. App. 3d 774, 112 Cal. Rpt. 66 (1974), where a person arrested for possession of heroin admitted to being a courier for the defendant, police entered defendant's residence and kept him and his parents under close observation for over two hours while a search warrant was acquired. After noting that there had not been grounds to obtain a search warrant until after the courier was intercepted and that as of that moment there was a risk that defendant would be alerted when the courier failed to complete the errand, the court held that these facts established a sufficient risk of destruction of the contraband to "justify the actions, less than search, of entry and monitoring the occupants."

In *Crespo*, the defendant contended that she was illegally "seized or arrested" in violation of the Fourth Amendment when she was asked to remain outside

after her house was secured by officers until they obtained a search warrant. The court found that:

> First, the fact that officers secure a dwelling until they obtain a search warrant, where probable cause exists to conduct a search, in order to prevent the destruction or removal of evidence, is not an unreasonable seizure of the dwelling or its contents. *Segura v. United States*, 468 U.S. 796, 810, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984). . . . Under *Segura*, securing of the [ ] residence was not an unreasonable seizure because probable cause existed that cocaine was present on the premises. *Id.*

The court went on that:

> Second, a person is not 'seized' within the meaning of the fourth amendment unless, in view of all the circumstances surrounding the encounter with law enforcement officers, a reasonable person would have believed that he or she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980). There is nothing on this record to show that [defendant] was subject to threats or a show of force. . . . The evidence shows that the DEA agents informed [defendant] that she was not under arrest when they asked her to remain outside her house and that she voluntarily consented to wait in the police car until the warrant was delivered. The district court correctly determined that no fourth amendment violation occurred.

Crespo, 838 F.2d at 1016.

This Court has determined that the securing of premises from the outside is constitutionally permissible while the police await a warrant based on probable

cause. This procedure is being utilized and is bound to be utilized more frequently in the future. This Court should delineate the extent to which a possessory interest might be interfered with, and to what extent and how long. This case presents the perfect opportunity to address the issue. If the Illinois Appellate Court case here is allowed to stand, it would render the securing of residences virtually impossible to uphold, unless all of the persons possessing a possessory interest therein were under arrest or in police custody in some manner. This would severely limit the holding of *Segura*.

CONCLUSION

For the aforementioned reasons, Petitioner, the State of Illinois, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the Illinois Appellate Court, Fourth District, and remand for further proceedings.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
Counsel of Record
COLLEEN M. GRIFFIN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-4684

Counsel for Petitioner

APPENDIX

App. 1

[Dated May 7, 1999]

No. 5-97-0695

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

CHARLES McARTHUR,

Defendant-Appellee.

Appeal from the Circuit Court of Moultrie County,
No. 97CM44,
Honorable Arthur F. Powers, Jr., Judge Presiding.

JUSTICE COOK delivered the opinion of the court:

In May 1997, defendant Charles McArthur was charged by information with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of a substance containing less than 2.5 grams of cannabis. 720 ILCS 600/3.5(a); 550/4(a) (West 1996). Defendant filed a motion to suppress the evidence (a cannabis smoking pipe, a "one-hitter" box, and cannabis) found at his residence during the execution of a valid search warrant, arguing that his fourth amendment rights were violated because the police secured his residence and prevented him from reenter-

ing his residence alone during the two hours it took to obtain the search warrant. The trial court granted defendant's motion to suppress. The State appeals pursuant to Supreme Court Rule 604(a) (1). 145 Ill. 2d R. 604(a) (1). We affirm.

At the August 1997 hearing on defendant's motion to suppress, John Love, Sullivan assistant chief of police, testified that on the afternoon of April 2, 1997, at the request of defendant's wife, Tera McArthur, he and Officer Skidis accompanied her to a trailer where she and defendant resided, while she removed her property from the residence. After she finished removing her belongings, Tera told Love, who was standing on the porch, that defendant had "pot" in the trailer under the couch. Love knocked on the door and, when defendant answered, Love told him Tera said he had drugs in the trailer. Defendant denied he had drugs in the trailer. Defendant also denied Love's request to search the trailer for the drugs without a warrant. At that point, defendant was standing outside the trailer; however, Love did not recall whether he told defendant to come out of the trailer or if defendant came out on his own.

Upon Love's request, Tera told Love she would testify before a judge about what she had seen in the trailer. As a result, Love sent her with Officer Skidis to secure a search warrant for the residence. Love went back to the porch and told defendant what was happening. From that point, Love did not allow defendant to reenter the trailer unless accompanied by police so that defendant could not destroy or dispose of the evidence. Love allowed defendant to enter the residence on two or three occasions to get cigarettes and make telephone

calls, during which times Love stepped "right inside the door and just stood by the doorway the entire time."

According to the trial court, the search warrant was issued at 5:05 p.m. When police returned with the warrant, they entered the trailer, found cannabis and drug paraphernalia and placed defendant under arrest. Love testified that, before this point, no officer had told defendant he was under arrest, placed him in handcuffs, or told him he was not free to leave. Love testified no search of defendant's residence took place prior to the arrival of the search warrant.

Defendant testified his wife arrived with police officers at approximately 3:15 p.m. While Tera removed her belongings the police remained on the porch and did not enter the trailer. After Tera finished, Love came to the door and told defendant about Tera's claim that there was marijuana inside the residence and that Love asked to search the trailer. Defendant told Love he could not search without a warrant. Defendant testified he was outside the trailer when he heard Love and Tera talking about obtaining a search warrant and that Tera agreed to leave to testify, and that he stayed outside the trailer on the porch until the warrant came. Love did allow defendant to enter the trailer to retrieve cigarettes and to make telephone calls. Love was present but did not search the trailer at those times. Love told defendant that he could not wait inside the trailer by himself, but had to be accompanied by an officer, until police arrived with the warrant. Defendant testified that had he been allowed to go back into his residence alone he "would have destroyed the marijuana."

Defendant estimated it took police one to two hours to return with the search warrant. When they returned with the warrant, he entered the trailer and showed them where the drugs were located. After police found the drugs, they arrested him, searched and handcuffed him, and advised him of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). While waiting for the search warrant, police never told defendant he was not free to leave.

The issue before us is whether the securing of a dwelling by police for approximately two hours while awaiting a search warrant, and not allowing the resident defendant into the dwelling unless accompanied by an officer to prevent the removal or destruction of evidence inside the dwelling, violates defendant's fourth amendment rights against unreasonable searches and seizures. Defendant does not contest the validity of the search warrant or that probable cause existed to secure the residence. A trial court's decision whether to suppress evidence will not be disturbed on review unless manifestly erroneous. *People v. Alvarado*, 268 Ill. App. 3d 459, 463, 644 N.E.2d 783, 786 (1994). However, "'where neither the facts nor credibility of the witnesses is contested, the issue * * * is a legal question which a reviewing court may consider *de novo*.'" *Alvarado*, 268 Ill. App. 3d at 463, 644 N.E.2d at 787, quoting *In re D.G.*, 144 Ill. 2d 404, 408-09, 581 N.E.2d 648, 649 (1991). We review this matter as a question of law to determine whether defendant's fourth amendment rights were violated.

A seizure affects an individual's possessory interests while a search affects his privacy interests. *Segura v.*

United States, 468 U.S. 796, 806, 82 L. Ed. 2d 599, 609, 104 S. Ct. 3380, 3386 (1984) (opinion of Burger, C.J., joined by O'Connor, J.). A "seizure" occurs when a meaningful interference with an individual's possessory interests occurs. *Segura*. 468 U.S. at 822, 82 L. Ed. 2d at 620. 104 S. Ct. at 3394 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.). The fourth amendment, by its terms, prohibits only "unreasonable" searches and seizures. U.S. Const., amend. IV; *Segura*, 468 U.S. at 806, 82 L. Ed. 2d at 609, 104 S. Ct. at 3386 (opinion of Burger, C.J., joined by O'Connor, J.). A seizure based upon probable cause that is reasonable when it commences may become unreasonable as a result of its duration or other circumstances. *Segura*, 468 U.S. at 812, 82 L. Ed. 2d at 613, 104 S. Ct. at 3389 (opinion of Burger, C.J., joined by O'Connor, J.).

The State argues that, in *Segura*, the Supreme Court held that the fourth amendment permits admission of evidence found in a dwelling during execution of a valid search warrant when the police secured the dwelling from the inside for 19 hours while awaiting issuance of the search warrant. The State contends that *Segura* supports a finding that the fourth amendment permits admission of the evidence seized in this case.

In *Segura*, police arrested petitioner in the lobby of his apartment building, took him to his apartment, entered the apartment, and arrested everyone present. *Segura*, 468 U.S. at 800-01, 82 L. Ed. 2d at 605-06, 104 S. Ct. at 3383 (opinion of Burger, C.J., joined by White, Powell, Rehnquist, and O'Connor, JJ.). Two officers remained inside the apartment for 19 hours after the initial entry until the search warrant was issued and executed, while the petitioners remained under arrest

and in custody at police headquarters. *Segura*, 468 U.S. at 801, 82 L. Ed. 2d at 606, 104 S. Ct. at 3383 (opinion of Burger, C.J., joined by White, Powell, Rehnquist, and O'Connor, JJ.). In a 5 to 4 decision affirming the admission of the evidence seized pursuant to the warrant, the Court held in part IV (and also restated in part I) that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents" under the fourth amendment. *Segura*, 468 U.S. at 810, 82 L. Ed. 2d at 612, 104 S. Ct. at 3388 (opinion of Burger, C.J., joined by O'Connor, J.).

The authority of the *Segura* decision has been questioned. See J. Dressler, *A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftsmanship of Segura v. United States*, 26 Win. & Mary L. Rev. 375 (1985) (hereinafter Dressler). First, only two justices joined in part IV of the opinion, and so part IV is not part of the opinion of the Court. *Segura*, 468 U.S. at 797, 82 L. Ed. 2d at 600, 104 S. Ct. at 3380. Consequently, neither part IV, nor part I, which incorporates the holding stated in part IV, is binding precedent upon lower courts. *People v. Casazza*, 144 Ill. 2d 414, 419-20, 581 N.E.2d 651, 654-55 (1991); see Dressler at 416 ("[p]art IV is, in fact, a concurring opinion by two justices, and can be deleted without affecting the opinion"). Second, the Court (in part IV) never determined whether police effect a seizure of the premises and its contents within the meaning of the fourth amendment when they secure a dwelling. The justices assumed such action constituted a seizure of the residence and its contents, but in that case concluded that the seizure was not unreasonable under the circumstances. *Segura*,

468 U.S. at 806, 82 L. Ed. 2d at 609, 104 S. Ct. at 3386 (opinion of Burger, C.J., joined by O'Connor, J.). Nor did the Court express a view regarding whether securing a dwelling may "legitimately extend to limiting the freedom of movement of persons within, into or out of the impounded premises" (3 W. LaFave, Search & Seizure §6.5(c), at 366 (3d ed. 1996) (hereinafter LaFave)) or if such action constitutes a seizure or illegal arrest of the defendant resident. The Court did, however, seem to limit its holding (part IV) to the specific facts before it. During the time the police secured the dwelling from the inside, the petitioners were under arrest and in police custody. As a result:

> "The actual interference with their possessory interests in the apartment and its contents was, thus, virtually nonexistent. [Citation.] We are not prepared to say *under these limited circumstances* that the seizure was unreasonable under the Fourth Amendment." (Emphasis added.) *Segura*, 468 U.S. at 813, 82 L. Ed. 2d at 614, 104 S. Ct. at 3390 (opinion of Burger, C.J., joined by O'Connor, J.).

Both the *Segura* majority and the dissent implied that securing a residence from the outside when probable cause exists may not violate the fourth amendment's prohibition against unreasonable seizures. Part IV of the opinion notes that the police in that case would arguably have been wiser to "secure the premises from the outside by a 'stakeout'" and that entry into a residence is illegal absent exigent circumstances even when police have probable cause and are awaiting a search warrant. *Segura*, 468 U.S. at 811-12, 82 L. Ed. 2d at 613, 104 S. Ct. at 3388-89 (opinion of Burger, C.J., joined by O'Connor, J.). The dissent acknowledged:

> "Since these premises were impounded 'from the inside,' I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter." *Segura*, 468 U.S. at 824 n.15, 82 L. Ed. 2d at 621 n.15, 104 S. Ct. at 3396 n.15 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

See also LaFave §6.5(c), at 366 ("[a]ll members of the Court appear to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause even absent exigent circumstances").

Several conclusions may be derived from *Segura*. First, the Court did not address whether police, when securing a residence, may limit the "freedom of movement of persons within, into or out of" the secured premises (LaFave §6.5(c), at 366). The Court seemed to agree that the seizure of a residence and its contents is permissible absent exigent circumstances if there is probable cause, but that entry into the residence when securing it requires probable cause and exigent circumstances. LaFave §6.5(c), at 366-67. Whatever may be gleaned from the *Segura* decision, it did not address how to handle those cases where "police enter and incident to the entry either keep persons entitled to be in the premises under close scrutiny or else require such persons to leave or not enter those premises." LaFave §6.5(c), at 365.

Some courts have upheld the securing of a residence by police until a search warrant for the residence is issued. See, *e.g.*, *United States v. Crespo de Llano*, 838

F.2d 1006, 1011, 1016 (9th Cir. 1987); *Commonwealth v. Yesilciman*, 406 Mass. 736, 743, 550 N.E.2d 378, 383 (1990); see also LaFave §6.5(c), at 362 ("[s]ome courts have assumed, for example, that it is permissible for the police to place a guard outside of premises and to bar entry during the period in which a search warrant is being sought or, if persons are allowed to enter, to prohibit them from taking items from the premises"). However, cases where courts have found it permissible for police to secure a residence from the outside and to bar persons from entering the residence while awaiting a search warrant:

> "typically involved situations in which the only person or persons who could have claimed a lawful right to entry were already in custody or were subject to arrest if they appeared, or in which the person who did appear consented to remain outside." LaFave §6.5(c), at 362-63.

In *Casazza*, 144 Ill. 2d 414, 581 N.E.2d 651, the Supreme Court of Illinois concluded police had no authority to order persons off a yacht while police awaited a search warrant. *Casazza*, 144 Ill. 2d at 424, 581 N.E.2d at 656. Police went to defendants' yacht and informed the occupants that they either "could" or "would" obtain a search warrant and that people on board would have to leave while the police waited for the search warrant. *Casazza*, 144 Ill.2d at 415-16, 581 N.E.2d at 652-53. After police asked one of the defendants if they could search the yacht, the defendant asked what would happen if he did not consent to a search. Police repeated they could obtain a search warrant and require those on board to leave while they waited for the warrant. The defendant then consented

to a search of the yacht. *Casazza*, 144 Ill. 2d at 416, 581 N.E.2d at 653. In affirming defendants' motion to suppress the evidence discovered during the warrantless search of the yacht, the supreme court concluded the "police's illegal representation that they had authority to seize the yacht [ ], the trial court correctly found, vitiated the voluntariness of [defendant's] consent to the search." *Casazza*, 144 Ill. 2d at 424, 581 N.E.2d at 656. The court also concluded that *Segura* provided no authority for defending the police conduct in that case. *Casazza*, 144 Ill. 2d at 420, 581 N.E.2d at 655. Similarly in *People v. Dale*, 301 Ill. App. 3d 593, 703 N.E.2d 927 (1998), the police lacked the authority to order the defendant to leave his possessions in the motel room, after evicting him from the room, when the police had the lock changed and one officer waited in the lobby while others secured a search warrant. *Dale*, 301 Ill. App. at 601, 703 N.E.2d at 933. *Dale* explained that the Casazza court concluded police lacked the authority (because *Segura* did not support it) to seize premises while awaiting a search warrant. *Dale*, 301 Ill. App. at 601-02, 703 N.E.2d at 933.

In *People v. Wahlen*, 111 Ill. App. 3d 194, 195-97, 443 N.E.2d 728, 729-30 (1982), police arrived with defendant at his dorm room between 4 and 4:30 on a Sunday morning and advised him and his roommate that either the residents could consent to a search of the dorm room or it would be sealed off until a search warrant could be obtained, at least 24 hours later. Both residents gave their consent to search the room. *Wahlen*, 111 Ill. App. 3d at 196, 443 N.E.2d at 729. In affirming the trial court's grant of defendant's motion to suppress evidence found in the room because the residents' consent was coerced, this court explained: "We know of no authority in the police to 'seal' a room until a warrant may be obtained (if it may be obtained at all), and the time element here is not insignificant." *Wahlen*, 111 Ill. App. 3d at 197, 443 N.E.2d at 730.

At the heart of this issue is the preservation of evidence. Clearly, if police secure a dwelling they prohibit the destruction of the sought-after evidence. On the other hand, if police do not secure a dwelling, they risk losing the evidence, and as defendant testified at the hearing, if police had not secured his dwelling, he would have destroyed or disposed of the drugs and paraphernalia. Another option the police in this situation had was to bypass obtaining a search warrant and make a warrantless entry into defendant's residence to retrieve the evidence, although the potential that evidence will be destroyed, alone, is insufficient to justify a warrantless entry of a home. *People v. Eden*, 246 Ill. App. 3d 277, 287, 615 N.E.2d 1224, 1230 (1993); *cf. People v. Krueger*, 175 Ill. 2d 60, 67, 675 N.E.2d 604, 608 (1996) (exigent circumstances, including the ease with which evidence may be destroyed, excuse an officer's compliance with the knock-and-announce rule preceding an arrest or a search). Instead of searching the residence without a warrant, police in this case opted to wait for a judge's determination whether to issue a search warrant for defendant's residence.

This case does not fall within any of the three situations when courts have found it permissible for police to secure a residence from the outside while seeking a search warrant. See LaFave §6.5(c), at 362-63. Nor is the police conduct in this case exactly like *Casazza* or *Dale* because there is no evidence the police affirma-

tively ordered defendant out of the trailer (and to leave his belongings) while awaiting the search warrant. This case represents a situation that *Segura* did not address. See LaFave §6.5(c), at 365.

We find that there was no authority for the police action in this case. Defendant was inside his residence when the police came to his door and he refused to let them search without a search warrant. While the police were still on the premises defendant moved from the inside of his trailer out onto the front porch when police told him he had to remain outside the trailer or that he could go inside only if accompanied by an officer. Though not inside his residence, defendant was still on his premises when police refused to let him reenter the trailer unaccompanied. Even though police had probable cause to secure the residence (defendant does not dispute this), the police conduct amounted to a constructive eviction of defendant from his residence. This case is different from a situation in which the defendant resident is not on the premises when police arrive to secure the residence from the outside while seeking a search warrant; that is, where police, with probable cause, secure a residence and do not permit anyone arriving at the premises (from the outside) entrance into the residence.

Furthermore, the police also secured the dwelling from the inside when Love followed defendant into the trailer, and Love physically entered the trailer to observe defendant and ensure defendant did not destroy the evidence. Unlike *Segura*, where police entered the dwelling when the defendants were arrested and in custody, defendant here was not arrested and Love's entrance into the trailer amounted to both a meaning-

ful interference with defendant's possessory interests (a seizure) and his privacy interests (a search). See *Segura*, 468 U.S. at 806, 82 L. Ed. 2d at 609, 104 S. Ct. at 3386 (opinion of Burger, C.J., joined by O'Connor, J.); see also LaFave §6.5(c), at 366. Police entry into a residence absent exigent circumstances (even with probable cause) is illegal (*Segura*, 468 U.S. at 811-12, 82 L. Ed. 2d at 613, 104 S. Ct. at 3388-89 (opinion of Burger, C.J., joined by O'Connor, J.,)) and no exigent circumstances here justified Love's entry into the trailer. See *Eden*, 246 Ill. App. 3d at 287, 615 N.E.2d at 1230. We conclude the police conduct in securing defendant's residence while awaiting the search warrant was an unreasonable seizure (and probably an unreasonable search) under the fourth amendment so that the evidence discovered in the residence upon execution of the search warrant was properly suppressed.

A person is "seized" within the meaning of the fourth amendment only when, considering all the circumstances surrounding the encounter with the police, a reasonable person would have believed he was not free to leave. *Crespo de Llano*, 838 F.2d at 1016. Whether the defendant was subjected to threats or a show of force by police is also a relevant consideration. *Crespo de Llano*, 838 F.2d at 1016. A defendant's subjective belief that he is under arrest is irrelevant in determining whether an arrest has occurred, but the police's intent and whether the defendant has been told that he is under arrest are appropriate considerations. *People v. Maltbia*, 273 Ill. App. 3d 622, 628, 653 N.E.2d 402, 406-07 (1995).

It is unclear whether the police effected a seizure of defendant's person when they secured his residence

and, if so, whether the seizure was unreasonable. No evidence in the record indicates the police threatened defendant or made a physical show of force toward him. Prior to the police placing defendant under arrest after conducting the search pursuant to the warrant, no officer ever placed him in handcuffs, told him he was under arrest, or told him he was not free to leave. It appears that during the time police secured his residence defendant was free to go anywhere in the world except back into his trailer by himself. (However, despite the testimony, it is questionable whether police would have allowed defendant to leave the premises and whether defendant actually felt free to leave under the circumstances). The securing of defendant's residence under these circumstances may have included an unreasonable seizure of defendant's person as well. But see LaFave §6.5(c), at 366 ("to the extent that a stakeout effects a sort of seizure of the person of an individual who is thereby thwarted from gaining entry to the premises, it is again not remarkable that this may be done without either a warrant or exigent circumstances, for neither is necessary for a more substantial interference with a person—arrest—occurring off private premises").

We affirm the order of the trial court granting defendant's motion to suppress evidence.

Affirmed.

STEIGMANN and MYERSCOUGH, JJ., concur.

87677

CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 6, 1999

Mr. Charles F. Mansfield
Staff Atty. State's Atty. Appellate Prosecutor
725 South 2nd Street
Springfield, IL 62704

No. 87677 – People State of Illinois, petitioner, v. Charles McArthur, respondent. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1999.